Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 02()-24 OF 2011(W) AND 02()–25 OF 2011
RAUS SHARIF PCA, AHMAD MAAROP AND HASAN LAH FCJJ
7 NOVEMBER 2011

Civil Procedure — Summary judgment — Appeal — Summary judgment set aside — Whether there were serious disputed facts involved which needed to be tried — Whether O14A suitable in determining applicability of s 314 of the Companies Act 1965 to partnership — Rules of the High Court 1980 O 14A — Companies Act 1965 s 314

Partnership — Dissolution — Winding up of partnership by creditor — Whether partnership would qualify as unregistered company pursuant to s 314 of the Companies Act 1965 — Whether partnership had more than five members when winding up petition presented — Whether order to wind up partnership ought to be set aside — Companies Act 1965 s 314 — Partnership Act 1961 ss 40 &41

Statutory Interpretation — Construction of statutes — Rules of construction — Whether words of statute were clear and unambiguous — Whether literal interpretation ought to apply — Companies Act 1965 s 314

The first, second, third and fifth plaintiffs were partners in a partnership known as ARCI Enterprise ('the partnership') which was registered on 8 October 1992, while the fourth plaintiff was the administrator of the estate of a deceased partner of the partnership. The first defendant allegedly acquired 5% of the shares in the partnership and appointed the third defendant to be its representative in relation to these shares. Disputes arose in relation to the 5% shares and many civil suits were filed against the partnership in various courts. Among the suits filed against the partnership was the first defendant's suit for the sum of RM6,157,121.57 owed to it by the partnership. While this suit was still pending, the first defendant filed a creditor's petition seeking to wind up the partnership for the very same amount of RM6,157,121.57. The court granted the winding up order and appointed the second defendant as the liquidator of the partnership. The plaintiffs then filed a suit to set aside the winding up order and the appointment of the second defendant as the liquidator of the partnership. The first and second defendants sought to strike off the plaintiffs' writ of summons and statement of claim. The High Court judge hearing the plaintiffs' suit treated the entire matter of the suit as disposed

of under O 14A of the 1980 Rules of the High Court ('RHC') upon the determination of whether the winding up order could be set aside by this court on the ground that it was a nullity *ab initio*. The High Court judge accordingly set aside the winding up order and the appointment of the second defendant as the liquidator of the partnership and dismissed the first and second defendants' application to strike off the plaintiffs' suit. The first and second defendants appealed to the Court of Appeal against that decision, while the plaintiffs cross-appealed to have their writ of summons and statement of claim reinstated. The Court of Appeal disagreed with the High Court judge and held that the partnership could be wound up under Part X of the Companies Act 1965 ('the Act') by virtue of the definition of 'unregistered company' in s 314(1) of the Act. The High Court judge's order with regard to O 14A was therefore set aside. However, the Court of Appeal upheld the High Court judge's decision to dismiss the first and second defendants' application to strike off the plaintiffs' suit. The Court of Appeal also allowed the plaintiffs' cross-appeal. Thereafter the plaintiffs obtained the leave of this court to proceed with the present appeals. The appeals are against that part of the judgment of the Court of Appeal which set aside the decision of the High Court judge that the winding up order and the appointment of the second defendant as the liquidator of the partnership be set aside. It was the plaintiffs' contention that it would be absurd for a partnership registered under the Partnership Act 1961 ('the PA') to also be categorised as an unregistered company pursuant to s 314 of the Act. Alternatively the plaintiffs submitted that even if the Court of Appeal was right in holding that the partnership was an unregistered company under s 314 of the Act, it did not fulfill the requirement of s 314 of the Act in that it did not comprise of more than five partners when the winding up petition was presented.

Held, dismissing the appeals with costs:

(1) This court was in agreement with the Court of Appeal's interpretation of s 314(1) of the Act. It was found that the words of s 314(1) of the Act were clear and unambiguous and ought to be given their literal interpretation. As such, the words 'foreign company and any partnership' in s 314(1) of the Act ought to be read disjunctively, with the word 'foreign' qualifying only the word 'company' and not qualifying the word 'partnership' (see paras 31–33).

(2) The provisions of the PA, in particular ss 40 and 41, only dealt with the voluntary winding up of a partnership by the partners themselves and no other. A creditor could not make an application under the PA to wind up a partnership. As such, s 314 of the Act was applicable in a situation where a creditor sought a remedy against an insolvent partnership which had more than five members. Therefore a partnership with more than five members was an unregistered company and could be wound up under Part X of the Act by virtue of the definition of unregistered company in

s 314(1) of the Act. However, on the facts of the present case it was not clear whether the partnership had only five members at the time of the presentation of the winding up petition. In fact this issue as to the number of members of the partnership at the material time could only be determined in a full trial (see paras 36–44).

(3) It was trite law that O 14A of the RHC could only be resorted to if there was no dispute by the parties as to the relevant facts, or the court concluded that the material facts were not in dispute. In the present case there were serious disputed facts involved and these issues of fact were interwoven with the legal issues raised. As such, the Court of Appeal was correct in finding that O 14A of the RHC was not suitable for the purpose of determining the applicability of s 314 of the Act to the partnership in the present case (see paras 46–48).

[Bahasa Malaysia summary

Plaintif pertama, kedua, ketiga dan kelima adalah rakan-rakan kongsi dalam perkongsian yang dikenali sebagai ARCI Enterprise ('perkongsian') yang telah didaftarkan pada 8 Oktober 1992, manakala plaintif keempat adalah pentadbir harta pusaka rakan kongsi perkongsian tersebut yang telah meninggal dunia. Defendan pertama didakwa memperolehi 5% saham dalam perkongsian tersebut dan melantik defendan ketiga untuk menjadi wakilnya berhubung dengan saham-saham tersebut. Pertikaian timbul berhubung dengan saham 5% tersebut dan banyak guaman sivil telah difailkan terhadap perkongsian di pelbagai mahkamah. Antara guaman yang difailkan terhadap perkongsian tersebut adalah guaman defendan pertama bagi jumlah sebanyak RM6,157,121.57 terhutang kepadanya oleh perkongsian. Walaupun guaman ini masih belum selesai, defendan pertama memfailkan petisyen pemiutang untuk menggulung perkongsian tersebut bagi jumlah yang sama sebanyak RM6,157,121.57. Mahkamah memberikan perintah penggulungan dan melantik defendan kedua sebagai pelikuidasi perkongsian. Plaintif-plaintif memfailkan guaman untuk mengenepikan perintah penggulungan dan pelantikan defendan kedua sebagai pelikuidasi perkongsian. Defendan pertama dan kedua cuba untuk membatalkan writ guaman dan penyataan tuntutan plaintif. Hakim Mahkamah Tinggi yang mendengar guaman plaintif mengganggap seluruh perkara guaman tersebut telah dilupuskan di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dalam penentuan sama ada perintah penggulungan boleh diketepikan oleh mahkamah ini atas alasan bahawa ia adalah terbatal ab initio. Hakim Mahkamah Tinggi, sewajarnya, mengenepikan perintah penggulungan dan pelantikan defendan kedua sebagai pelikuidasi perkongsian tersebut dan menolak 'application to strike off the plaintiffs' defendan pertama dan kedua. Defendan pertama dan kedua merayu kepada Mahkamah Rayuan terhadap keputusan tersebut, manakala plaintif-plaintif membuat rayuan balas supaya writ guaman dan penyata tuntutan mereka dimasukkan semula. Mahkamah Rayuan tidak

bersetuju dengan hakim Mahkamah Tinggi dan memutuskan bahawa perkongsian tersebut boleh digulung di bawah Bahagian X Akta Syarikat 1965 ('Akta') menurut takrif 'unregistered company' dalam s 314(1) Akta. Perintah hakim Mahkamah Tinggi tersebut berkenaan A 14A diketepikan. Walau bagaimanapun, Mahkamah Rayuan mengekalkan keputusan hakim Mahkamah Tinggi menolak permohonan defendan pertama dan kedua guaman untuk pembatalan guaman plaintif-plaintif. Mahkamah Rayuan juga membenarkan rayuan balas plaintif. Selepas itu, plaintif-plaintif memperolehi kebenaran mahkamah ini untuk meneruskan dengan rayuan-rayuan sedia ada. Rayuan-rayuan adalah terhadap bahagian penghakiman Mahkamah Rayuan yang mengenepikan keputusan hakim Mahkamah Tinggi bahawa perintah penggulungan dan pelantikan defendan kedua sebagai pelikuidasi perkongsian tersebut adalah diketepikan. Adalah hujahan plaintif-plaintif bahawa ia menjadi tidak masuk akal bagi perkongsian yang didaftarkan di bawah Akta Perkongsian 1961 ('AP') untuk turut dikategorikan sebagai syarikat yang tidak berdaftar di bawah s 314 Akta tersebut. Secara alternatifnya, plaintif-plaintif menghujahkan bahawa walaupun Mahkamah Rayuan betul dalam memutuskan bahawa perkongsian tersebut adalah sebuah syarikat yang tidak berdaftar di bawah s 314 Akta tersebut, ia tidak memenuhi keperluan s 314 Akta tersebut di mana ia tidak mengandungi lebih daripada lima rakan kongsi ketika petisyen penggulungan dikemukakan.

Diputuskan, menolak rayuan dengan kos:

(1) Mahkamah bersetuju dengan tafsiran Mahkamah Rayuan ke atas s 314(1) Akta. Didapati bahawa perkataan-perkataan s 314(1) Akta adalah jelas dan tidak mengelirukan dan harus diberikan tafsiran literal. Oleh itu, perkataan 'foreign company and any partnership' dalam s 314(1) Akta sepatutnya dibaca berasingan, dengan perkataan 'foreign' melayakkan hanya perkataan 'company' dan tidak melayakkan 'partnership' (lihat perenggan 31–33).

(2) Peruntukan-peruntukan AP, khususnya ss 40 dan 41, hanya membincangkan penggulungan perkongsian sukarela oleh rakan-rakan kongsi sendiri dan tidak yang lain. Pemiutang tidak boleh membuat suatu permohonan di bawah AP untuk menggulung perkongsian. Oleh itu, s 314 Akta adalah terpakai dalam keadaan di mana pemiutang mencari remedi terhadap perkongsian tak solven yang mempunyai lebih daripada lima ahli. Oleh itu, perkongsian dengan lebih daripada lima ahli adalah sebuah syarikat yang tidak berdaftar dan boleh digulung di bawah Bahagian X Akta menurut takrif syarikat yang tidak berdaftar di bawah s 314(1) Akta. Walau bagaimanapun, berdasarkan fakta kes ini, tidak jelas sama ada perkongsian tersebut hanya mempunyai lima ahli pada masa penyampaian petisyen penggulungan. Sebenarnya isu berkenaan bilangan anggota perkongsian pada masa material hanya boleh ditentukan dalam perbicaraan penuh (lihat perenggan 36–44).

(3) Ia adalah undang-undang nyata bahawa A14A KMT hanya boleh diguna pakai sekiranya terdapat sebarang pertikaian oleh pihak-pihak kepada fakta yang berkaitan, atau mahkamah membuat kesimpulan bahawa fakta-fakta yang material tidak dipertikaikan. Dalam kes ini, terdapat fakta-fakta serius yang dipertikaikan terlibat dan isu-isu ini sebenarnya telah berkait dengan isu-isu undang-undang yang dibangkitkan. Oleh itu, Mahkamah Rayuan adalah betul dalam memutuskan bahawa A 14A KMT tidak sesuai bagi tujuan menentukan penggunaan s 314 Akta bagi perkongsian dalam kes ini (lihat perenggan 46–48).]

Notes

For cases on appeal, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 7713–7886.

For cases on dissolution, see 10 *Mallal's Digest* (4th Ed 2011 Reissue) paras 995–996.

For cases on rules of construction, see 11 *Mallal's Digest* (4th Ed 2011 Reissue) paras 1971–1992.

Cases referred to

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian-Finance Bhd [1998] 1 MLJ 393, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812, CA (refd)

Duport Steel Ltd v Sirs [1980] 1 WLR 142, HL (refd)

MBf Holdings Bhd v Emtex Corp Bhd [1986] 1 MLJ 477, SC (refd)

PP v Wong Hong Toy & Anor [1986] 1 MLJ 133 (refd)

State of Bank of India v Mariani Marketing 1 March 1991, CA Transcript No 91/0304

United Overseas Bank (M) Sdn Bhd v UJA Sdn Bhd & Another Appeal [2009] 6 MLJ 857; [2010] 6 CLJ 204, CA (refd)

Vickers, Sons and Maxim, Ltd v Evans [1910] AC 444, HL (refd)

Legislation referred to

Bankruptcy Act 1967 ss 98, 100, 103

Companies Act [SG] ss 314, 315

Companies Act 1965 ss 314, 314(1), 315, 315(1), 317(2), Part X

Partnership Act 1961 ss 34(1)(a), 37, 37(f), 40, 41 Part V

Rules of the High Court 1980 O 14A, O 18 r 19(1)(b), (d)

Appeal from: Civil Appeal Nos W–02 (NCC) 2686 of 2010 and W–02 (NCC) 2687 of 2010 (Court of Appeal, Putrajaya)

Manpal Singh Sacdev (Rabinder Singh, Nasoha Abdul Rahman and WH Tan with him) (Rabinder Budiman & Associates) for the appellants.

Amir Asree bin Meor Nordin (Zainul Rijal Talha & Amir) for the respondent in Case No 02()-24 of 2011 (W).

Haniff Khatri (Amelda Md Din with him) (Amelda & Partners) for the respondent in Case No 02()-25 of 2011(W).

Hasan Lah FCJ:

[1] These two appeals concern the interpretation of s 314 of the Companies Act 1965 ('the Act'). Leave to appeal was granted by this court on 6 April 2011 on the following question:

> Whether the partnership of ARCI Enterprise would qualify as an unregistered company pursuant to s 314 of the Companies Act 1965.

[2] These two appeals are against the decision of the Court of Appeal which had allowed the defendants' appeal against the decision of the High Court given on 26 August 2010. The respondent in Appeal No 02–24 of 2011(W) was the second defendant in the High Court. The respondent in Appeal No 02–25 of 2011(W) was the first defendant in the High Court. The five appellants were the plaintiffs in the High Court. The parties have agreed that both the appeals be heard together as they involved the same question of law.

[3] We reserved our judgment after hearing these appeals. We now give our decision and the reasons for the same.

[4] The brief facts of this case as found by the Court of Appeal are as follows. The plaintiffs claimed to be partners at some point or another in a partnership by the name of ARCI Enterprise which was registered on 8 October 1992 ('the Partnership'). However a partnership by this name was also registered on 29 July 2004 and 12 January 2006.

[5] The partnership had the following persons as the first partners:

(a) Yee Fook Shin ('the fifth plaintiff');

(b) Yee Chong Man;

(c) Yon Kat Keong;

(d) Thein Hock Teck ('the first plaintiff');

(e) Yee Fook Choy ('the second plaintiff');

(f) Yee Chong Khoon ('the third plaintiff'); and

(g) Syed Khairul Azhar bin Syed Talib.

[6] The fourth plaintiff is the administrator of the estate of Yong Kat Keong. Yee Chong Man is not involved in the disputes that followed.

[7] Disputes arose in relation to the 5% shares held by Syed Khairul Azhar. He purportedly sold his rights, title and interest in his shares in the partnership to the first defendant who then appointed the third defendant to be its representative in relation to Syed Khairul Azhar's shares in the partnership.

[8] Over the several years since the dispute arose, not less than nine actions had been commenced in various courts prior to the filing of Suit No D-22NCC-776 of 2009, which is the suit in the instant appeals.

[9] Among the suits filed was Suit No 22–76 of 2001 which was filed by the third defendant in the High Court at Kuantan. The High Court at Kuantan apparently made an order dissolving the partnership. That order was apparently set aside. However, pursuant to that order a meeting of creditors (which included the first defendant) of the partnership was held on 11 May 2007 and the second defendant was appointed as the provisional liquidator of the partnership.

[10] In the meantime Suit No MT(1)–22–82 of 2003 was filed by the first defendant in the High Court at Kuantan to claim a sum of RM6,157,121.57 which was said to be the amount owed by the partnership.

[11] While Suit No MT(1)–22–82 of 2003 was still pending in the High Court at Kuantan, the first defendant filed a creditor's petition (No MT3–28–15 of 2007) in the Malacca High Court seeking to wind up the partnership for the very same amount claimed in Suit No MT(1)–22–82 of 2003.

[12] The Malacca High Court granted the petition and the second defendant was appointed as the liquidator of the partnership.

[13] The plaintiff then filed the suit (D-22NCC-776 of 2009) at the Kuala Lumpur High Court, from which the appeals before us emanated, to have the winding up order and the appointment of the second defendant as the liquidator be set aside.

[14] Essentially the plaintiffs relied on three main grounds to support their case, namely, that the petition was not served on the partnership but was served on the second defendant as the purported provisional liquidator of the partnership, that the first defendant had not obtained judgment for the sum claimed, and that the partnership had sufficient assets to pay its debts.

[15] The plaintiffs then filed a summons in chambers ('encl 3') seeking an order to set aside the winding up order made by the Malacca High Court

against the partnership and the appointment of the second defendant as a liquidator. They also sought an order that the partnership be allowed to continue to conduct its business.

[16] The first and second defendants later filed summons in chambers ('encls 10 and 11') seeking to have the plaintiffs' writ of summons and statement of claim struck out under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980.

[17] The learned High Court judge, on his own motion, decided that the entire cause or matter of the suit before him could be finally disposed of under O 14A of the Rules of the High Court 1980 upon the determination of the two legal issues which he posed to the parties, namely:

(a) whether the order of the Malacca High Court dated 8 May 2008 can be set aside by this court on the ground that it is a nullity *ab initio*; and

(b) if so, whether this court has jurisdiction to set aside an order of concurrent jurisdiction.

[18] The learned High Court judge concluded that the order of the Malacca High Court was a nullity *ab initio* as a partnership was excluded from the regime of the Act. In his view the words 'foreign company and any partnership' in s 314(1) of the Act must be read conjunctively and not disjunctively. The learned High Court judge therefore held that, based on the Federal Court decision in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian-Finance Bhd* [1998] 1 MLJ 393, that winding up order can be set aside by a court of concurrent jurisdiction. He therefore set aside that winding up order as well as the order appointing the second defendant as the liquidator of the partnership.

[19] With that decision the learned High Court judge treated the entire matter of the suit as disposed off pursuant to O 14A of the Rules of the High Court 1980. The learned High Court judge also made an order dismissing encls 3, 10 and 11.

[20] Against those decisions of the High Court, the first and second defendants appealed to the Court of Appeal. The plaintiffs also cross-appealed, seeking to have their writ of summons and statement of claim reinstated.

[21] The Court of Appeal disagreed with the learned High Court judge's interpretation of s 314(1) of the Act. The Court of Appeal held that the partnership could be wound up under Part X of the Act by virtue of the definition of 'unregistered company' in s 314(1). The order of the learned High Court judge with regard to O 14A was therefore set aside. However the Court

of Appeal upheld the learned High Court judge's decision in respect of encls 10 and 11 as the Court of Appeal was of the view that there were issues to be tried. The plaintiffs' cross-appeal was allowed.

[22] Section 314(1) of the Act provides:

> For the purposes of this Division 'unregistered company' includes a foreign company and any partnership, association or company consisting of more than five members but does not include a company incorporated under this Act or under any corresponding previous law.
>
> …

[23] The learned High Court judge, after having considered the corresponding provisions in the United Kingdom and India, opined that:

> 12. In the Malaysian context it will appear parliament in its wisdom had as early as 1965 has disentangled from the UK Companies Act 1948 relating to unregistered company and had specifically excluded 'partnership' to be wound up pursuant to CA 1965 unless it involves a foreign company.

[24] As stated earlier the learned High Court judge was of the view that the words 'foreign company and any partnership' in that section must be read conjunctively and not disjunctively. According to the learned High Court judge there is a separate regime provided by law to deal with insolvency of partners or dissolution of partnership firms. As such Parliament did not intend that partnership be treated as unregistered company and be wound up by the company court. In other words, the learned High Court judge had read the definition of 'unregistered company' in that section as if the word 'foreign' qualified not only 'partnership', but also 'company', as if the only partnership that could come within that definition was a partnership which had a foreign company as a partner.

[25] The Court of Appeal, on the other hand, was of the view that the word 'includes' in the definition of 'unregistered company' means that in addition to whatever usual meaning that term 'unregistered company' carries, that term includes the entities which are listed after the word 'includes'. Hence, the presence of the word 'and' simply means that the term 'unregistered company' includes a foreign company and also any 'partnership, association or company consisting of more than five members'. However, a company incorporated under the Act or under any corresponding previous written law is not an unregistered company within that definition. In support of that finding the Court of Appeal cited the judgment of Wee Chong Jin CJ in the Singapore's case of *Public Prosecutor v Wong Hong Toy & Anor and Wong Hong Toy & Anor* [1986] 1 MLJ 133. That case concerns the applicability of ss 314 and 315 of

the Singapore's Companies Act to societies. Those provisions are in pari materia with our ss 314 and 315 of the Act.

[26] Learned counsel for the appellants submitted that the word 'and' in s 314 of the Act tended to imply that provision specifically referred to foreign companies and partnerships which have not been incorporated pursuant to any laws in Malaysia. In other words, that provision must be read conjunctively.

[27] It is the contention of learned counsel for the appellants that it would be absurd for a partnership that is registered pursuant to the Partnership Act 1961 to also be categorised as an unregistered company pursuant to s 314 of the Act. Learned counsel for the appellants submitted that no partnership registered in Malaysia can at the same time be categorised as an unregistered company because no partnership registered in Malaysia can be considered as a 'separate legal entity'.

[28] Learned counsel for the appellants also submitted that the Court of Appeal had erred in law and in fact in holding that there is no regime of law apart from s 314 of the Act to deal with insolvency of partners or dissolution of partnership firms, and in holding that there are no provisions in the Partnership Act 1961 which enabled a creditor to present a petition to wind up a clearly insolvent partnership. Learned counsel for the appellants submitted that ss 98, 100 and 103 of the Bankruptcy Act 1967 provide for bankruptcy actions to be taken against the partners of a partnership registered in Malaysia. In addition, s 37(f) of the Partnership Act 1961 gives the court a wide discretion to decree a dissolution of a partnership.

[29] Learned counsel for the appellants also submitted that the regime of law dealing with the winding up of partnership is also different in its manner of administration of assets of a partnership which is registered in Malaysia as compared to an unregistered company. This is because s 40 and s 41 of the Partnership Act 1961 appear to be diametrically opposed to the manner of administration of assets stipulated in s 317(2) of the Act.

[30] As an alternative argument, learned counsel for the appellants submitted that even if the Court of Appeal was right in holding that the partnership is an unregistered company pursuant to s 314 of the Act, at the time of the presentation of the winding up petition that is on 16 April 2007, the partnership comprised of five partners only at that point in time. As such the partnership did not fulfil the requirement of s 314 of the Act which provides that a partnership must comprise of more than five members.

[31] We are of the view that s 314(1) of the Act is clear and unambiguous. As such it must be given its literal interpretation. Under the circumstances it is not

the function of the court to re-write the statute in a way in which it considers reasonable. In other words, the High Court was not entitled to read words into that provision. Where the words of the statute are plain and unambiguous, the court ought to give effect to its plain meaning (see *Duport Steel Ltd v Sirs* [1980] 1 WLR 142; *MBf Holdings Bhd v Emtex Corp Bhd* [1986] 1 MLJ 477). In *Vickers, Sons and Maxim, Ltd v Evans* [1910] AC 444, which was referred to by the Court of Appeal in *United Overseas Bank (M) Sdn Bhd v UJA Sdn Bhd & Another Appeal* [2010] 6 CLJ 204 at p 208, Lord Loreburn LC said:

> My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this house sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

[32] We agree with the Court of Appeal that in s 314(1) of the Act the term 'unregistered company' includes:

(a) a foreign company; and

(b) any partnership, association or company consisting of more than five members,

but does not include a company incorporated under the Act or under any corresponding previous written law.

[33] It is therefore our unanimous view that the words 'a foreign company and any partnership, association or company consisting of more than 5 members' in s 314(1) of the Act ought to be read disjunctively. It is clear that the word 'foreign' qualifies only the word 'company'. In our view it is not correct to read the word 'foreign' before the word 'partnership' in construing that provision. The word 'foreign' does not qualify the word 'partnership'. That is the plain meaning of that provision.

[34] In its judgment the Court of Appeal cited the decision of Wee Chong Jin CJ, in *Public Prosecutor v Wong Hong Toy & Anor* [1986] 1 MLJ 133 where His Lordship, in rejecting the contention that the Singapore's Companies Act did not apply to a registered society, said:

> In my judgment, it cannot be attributed to the legislature the intention to exempt societies registered under the Societies Act from the jurisdiction of the courts to make a winding up order. Section 314(1) of the Companies Act expressly defines the term 'unregistered company' to include any association of five or more members and s 2 of the Societies Act expressly defines the term 'society' to include 'any …

> association often or more persons whatever its nature or object. I am of the opinion that it could not have been the intention of the legislature to exempt any association of ten or more persons which is registered as a society under the Societies Act from the provisions of s 315 of the Companies Act especially when the Act and the regulations made thereunder require it to have a registered place of business. To conclude otherwise would result in a registered society which is unable to pay its debts however recklessly incurred, being able to continue its activities and incur more liabilities until it can be dissolved under the provisions of the Societies Act.

[35] Learned counsel for the appellants submitted that the decision in that case ought to be distinguished on the basis that in that case there were no specific provisions in law for the winding up or dissolution of an insolvent association whereas in the instant case there are specific provisions in the Partnership Act 1961 and the Bankruptcy Act 1967 for action to be taken against partnerships that become insolvent.

[36] Part V of the Partnership Act 1961 deals with the dissolution of partnership. It is true as contended by learned counsel for the appellants that the court may decree a dissolution of a partnership under s 37 of the Partnership Act 1961. However, it must be noted that the application can be made only by a partner of a partnership. A creditor such as the respondents in the instant case cannot make an application under that s 37 to dissolve a partnership.

[37] Dissolution is distinct from the 'winding up' of a partnership business. Although the term dissolution implies termination, dissolution is actually the beginning of the process that ultimately terminates a partnership. For example, if a partner resigns or if a partnership expels a partner, the partnership is considered legally dissolved. Section 40 of the Partnership Act 1961 provides that after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue, notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership. Under s 41 of the Partnership Act 1961 any partner or his representative may, on the termination of a partnership, apply to the court to wind up the business and affairs of the firm.

[38] It is therefore clear that under the Partnership Act 1961 only the partners can make application to court to dissolve and wind up a partnership. A creditor cannot make application under the partnership Act 1961 to wind up a partnership. We are therefore of the view that s 314 of the Act is applicable in situation where a creditor seeks a remedy against an insolvent partnership which has more than five members. Not all partnership can be wound up under s 314 of the Act. The circumstances under which a partnership may be wound up are stated under s 315(1) of the Act. There is therefore no doubt that s 314

and s 315 of the Act can co-exist with s 40 and s 41 of the Partnership Act 1961. The Partnership Act 1961 deals only with the voluntary winding up of a partnership by the partners themselves and no other. On the other hand s 315 expressly states that s 314 does not apply in the event a partnership is wound up voluntarily.

[39] The partnership was registered on 8 October 1992 for a period of 8 October 1992 to 28 October 2000. It must be noted that at the date of the winding up order the registration of the partnership was not renewed. However, the partners had continued to register two other partnerships in the same name of the firm with a different composition of partners and in the absence of few partners on the grounds of sale, death and/or bankruptcy. The subsequent partnership was registered on 29 July 2004 with registration No 001502428–X and the third and final partnership was registered from 12 January 2006 to 11 January 2007 under the registration No 001593482–D. Section 34(1)(a) of the Partnership Act 1961 provides that subject to any agreement between the partners, a partnership is dissolved if entered into for a fixed term, by the expiration of that term.

[40] From the facts it is unclear what was the status of the partnership at the time of the presentation of the winding up petition at the Malacca High Court by the first defendant.

[41] Learned counsel for the appellants submitted that as the partnership had only five partners at the time of the presentation of the winding up petition, which was on 16 April 2007, the partnership did not therefore fulfil the requirement of s 314 of the Act to be categorised as an unregistered company because s 314 provides that a partnership must comprise of more than five members. In response, learned counsel for the respondents submitted that s 314 of the Act does not say whether the requirement to have more than five members has be complied with at the time of the presentation of the winding up petition.

[42] It is to be noted that s 314 and s 315 of the Act are under division 5 of Part X of the Act which deals with the winding up of unregistered companies. It is therefore our unanimous view that the requirement of having more than five members must be complied with at the time of the presentation of the winding up petition. The issue whether the partnership had more than five members at the time of the presentation of the winding up petition against the partnership was not considered by the learned High Court judge. With regard to this issue the Court of Appeal held:

> 47. In our view, a partnership with more than five members, as is the case of the Partnership wound up by the Melaka High Court, is an unregistered company and can be wound up under Part X of the Companies Act by virtue of the definition of 'unregistered company' in sub-s 314(1) of the Companies Act 1965.

[43] The facts, in our view, are not clear whether the partnership had only five members at the time of the presentation of the winding up petition against the partnership at the Malacca High Court. On the facts of the instant case we are of the view that the issue of how many members of the partnership were there at the time of the presentation of the winding up petition against the partnership could only be determined in a full trial where witnesses ought to be called and to be cross-examined so that full evidence on the matter are made available to the court for the court to make a proper finding on the issue.

[44] For the reasons given we would answer the question posed to us as follows. A partnership with more than five members is an unregistered company and can be wound up under Part X of the Act by virtue of the definition of unregistered company in s 314(1) of the Act.

[45] It is to be noted that the appellants appealed against only part of the judgment of the Court of Appeal, that is to say against the decision of the Court of Appeal which set aside the decision of the learned High Court judge that set aside the order of Malacca High Court dated 8 May 2008 given in Suit No 28–15 of 2007 and the appointment of the second defendant as a liquidator. In this appeal we are therefore only concerned with that part of the judgment of the Court of Appeal.

[46] In its judgment the Court of Appeal, inter alia, held that O 14A was not a suitable mechanism to dispose of the case as there were serious disputes of facts between the parties which needed to be tried. One of the critical disputes was the issue of whether the partnership had in fact been dissolved even before the filing of the petition for winding up. This led to the question of whether the appellants had locus standi to commence this action. There was also another issue relating to the decision of the Federal Court from one of the many suits filed in connection with the partnership which appears to preserve the rights of the partnership in respect of legal actions commenced before the dissolution of the partnership if it was indeed dissolved. It is clear from the notes of proceedings in the High Court and the learned High Court judge's grounds of judgment that the learned High Court judge had not addressed his mind as to whether the relevant or material facts were in dispute.

[47] It is trite law that O 14A of the Rules of the High Court 1980 may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinising the pleadings concludes that the material facts are not in dispute (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812). Where the issues of fact are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination for to do so would in effect be to give rulings in vacuo or on a hypothetical ruling,

which the court will not do (see *State of Bank of India v Mariani Marketing* 1 March 1991, CA Transcript No 91/0304).

[48] Having carefully considered the facts and the issues involved in the instant case we agree with the Court of Appeal that there were serious disputed facts involved. These issues of fact are interwoven with the legal issues raised. As such we agree with the finding of the Court of Appeal that O 14A is not suitable for the purpose of determining the applicability of s 314 of the Act to the partnership.

[49] For the reasons given, we dismiss both the appeals with costs.

Appeals dismissed with costs.

Reported by Kohila Nesan